

May 23, 2005

**DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

Appeal

Name of Petitioner: State of Nevada

Date of Filing: April 6, 2005

Case No.: TFA-0098

On April 6, 2005, the State of Nevada (the Appellant) filed an Appeal from determinations that the Acting Assistant General Counsel for General Law of the Department of Energy (DOE/GC) and the Office of Civilian Radioactive Waste Management (OCRWM) issued in response to a request for documents that the Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. DOE/GC issued its determination on February 24, 2005, and OCRWM issued its determination on March 23, 2005. This appeal, if granted, would require that DOE/GC and OCRWM release additional responsive information to the Appellant or provide a detailed explanation of their reasons for withholding such material.

I. Background

On January 8, 2005, the Appellant requested “detailed information with respect to the factors and criteria considered by the DOE in analyzing the five potential [transportation routes, or] corridors, as well as any documents disclosing the reasons for the selection of the Caliente corridor or the rejection of the other four, or the ranking in preference of the five.”¹ On February 24, 2005, DOE/GC issued a determination letter stating that it located 23 documents that were responsive to the Appellant’s request. DOE/GC provided six documents in their entirety and ten documents with deletions and withheld seven records in their entirety pursuant to FOIA Exemption 5.² Two documents were withheld on the basis of the attorney-client privilege and the remaining 15 documents were withheld on the basis of the deliberative process privilege. In addition, a portion of one of the documents provided with deletions was withheld pursuant to FOIA Exemption 6. On March 23, 2005, OCRWM issued its determination letter stating that it

¹ Appellant’s Appeal Letter (dated April 6) at 2.

² Letter from Abel Lopez, Director, FOIA/Privacy Group (Feb. 24, 2005) [hereinafter “DOE/GC Determination Letter”].

had located 84 responsive records.³ OCRWM provided five documents in their entirety and withheld 79 documents in their entirety pursuant to FOIA Exemption 5.⁴ OCRWM withheld one document on the basis of the attorney-client privilege and the remaining 78 on the basis of the deliberative process privilege.

The Appellant filed its appeal with OHA on April 6, 2005, asserting three grounds of appeal. In the appeal, the Appellant alleges:

1. Incomplete Documents Produced: Even as to the documents which DOE asserted “are provided to you in their entirety,” less than the entire document was delivered in some instances.
2. Unsubstantiated Assertion of the Deliberative-Process Exemption: DOE provides only boilerplate, conclusory reasons for delivering documents in redacted form due to alleged deliberative process privilege. DOE provides no description of the contents of any of those individual documents, nor does it specify what information in them is entitled to protection under the privilege asserted.
3. Failure to Segregate: DOE failed to explain its withholding of a very substantial amount of non-exempt factual information contained in the documents which have been delivered in extremely redacted form or which have been withheld in their entirety.⁵

We note that the Appellant does not appeal the information withheld pursuant to FOIA Exemption 5 under the attorney-client privilege or FOIA Exemption 6. Therefore, we will confine our analysis to documents which were withheld in part or in their entirety pursuant to FOIA Exemption 5 under the deliberative-process privilege. In addition, we will examine two documents which the Appellant contends were produced in part, although the determination letter stated that they were provided in their entirety.

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request.⁶ Nine exemptions set forth the types of information that an agency may withhold.⁷ Federal courts have determined that these nine exemptions must be narrowly construed.⁸ In addition, DOE regulations provide that the agency should release to the public material exempt from mandatory disclosure under the FOIA if the DOE

³ Letter from Ronald A. Milner, Chief Operating Office, OCRWM (Mar. 29, 2005) [hereinafter “OCRWM Determination Letter”].

⁴ *Id.*

⁵ Appellant’s Appeal Letter at 3.

⁶ 5 U.S.C. § 552(a)(3).

⁷ 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9).

⁸ *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)).

determines that federal law permits disclosure and if disclosure is in the public interest.⁹ Accordingly, even if a document can properly be withheld under an exemption, we must also consider whether the public interest demands disclosure pursuant to DOE regulations.

A. Incomplete Documents

As an initial matter, we note that we contacted DOE/GC regarding the two incomplete documents received by the Appellant. DOE/GC stated that one of the documents, entitled “Spent Nuclear Fuel Transportation,” is publicly available. Although the cover of this document states that it is available at the DOE or Yucca Mountain Project websites, we searched the sites and were unable to locate this document. DOE/GC should provide the Appellant with information about how to access this document. With respect to the second document, entitled “Transportation-related Decisions” and dated July 18, 2002, DOE/GC stated that the record produced was the title page of a larger document. The DOE should produce the document, or issue a new determination letter explaining reasons for withholding any portions of it.

B. Exemption 5

Exemption 5 shields from mandatory disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency.”¹⁰ In order to qualify for withholding under Exemption 5, information must meet two conditions: it must be an inter-agency or intra-agency document, i.e., its source and its recipient must each be a Government agency, and it must fall within the ambit of a privilege against discovery under the judicial standards that would govern litigation against the agency that holds it.¹¹ In the present case, DOE/GC and OCRWM each relied upon the deliberative process and attorney-client privileges of Exemption 5. However, since the Appellant only appeals the determination concerning those documents withheld under the deliberative process privilege, we will confine our analysis solely to those materials.

The deliberative process privilege permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated.¹² It is intended to protect frank and independent discussion among those responsible for making governmental decisions.¹³ In order to be shielded by Exemption 5 under this privilege, a record must be predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process.¹⁴ This privilege covers records that reflect the personal opinion of the writer rather than final agency

⁹ 10 C.F.R. § 1004.1.

¹⁰ 5 U.S.C. § 552(b)(5).

¹¹ *Department of the Interior v. Klamath Water Users*, 121 S. Ct. 1060, 1065 (2001).

¹² *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1974).

¹³ *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

¹⁴ *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 856 (D.C. Cir. 1980).

policy.¹⁵ Consequently, the privilege does not generally protect records containing purely factual matters. The determination must also adequately justify withholding of a document by explaining briefly how the claimed exemption applies to the document.¹⁶

As a preliminary matter, we note that DOE/GC withheld documents in connection with its exchanges with the DOE Office of the Secretary, the DOE Office of the Executive Secretariat, and OCRWM. OCRWM withheld documents conveying its communications with the Office of National Transportation. Therefore, these documents clearly qualify as either intra-agency or inter-agency communications.

1. Documents Withheld by DOE/GC

With respect to the documents redacted in part or withheld in their entirety by DOE/GC, the Appellant asserts that

DOE's explanation and justification for the deletions [in the records] are vague and general and lack any specificity and any "nexus" to the specific information redacted from any particular document. It is impossible to tell, from the DOE's explanation, what portions of what documents were withheld for what reason.¹⁷

We find that the determination letter clearly indicates the nature of the privilege claimed—the deliberative process privilege. The letter also states that the documents are pre-decisional because “they were prepared prior to the undertaking of any action by the agency,” and are deliberative “because they are part of the deliberative process by which agency action was considered and taken.”¹⁸ It further explains that the “information deleted reflects advisory opinions from subordinates that are part of the process by which government decisions and policies were considered.”¹⁹ Under the circumstances of this case, we find these statements specific enough. We have examined all the materials withheld by DOE/GC and agree that portions of each document are pre-decisional and deliberative. Therefore, we find that the documents qualify for withholding under the deliberative process privilege of Exemption 5.

2. Documents Withheld by OCRWM

The Appellant asserts that OCRWM did not adequately justify the documents withheld under the deliberative process privilege.

Nowhere in its correspondence does DOE-OCRWM ever attempt to discuss or explain individual documents, but simply limits its conclusory remarks to the group of 79 cumulatively.²⁰

¹⁵ *Id.*

¹⁶ *Arnold & Porter*, 12 DOE at ¶ 80,108 at 80,527 (1984); *Paul W. Fox*, 25 DOE ¶ 80,150 at 80,622 (1995).

¹⁷ Appellant's Appeal Letter at 3.

¹⁸ DOE/GC Determination Letter at 2.

¹⁹ *Id.* at 2.

²⁰ *Id.*

We find that the determination letter issued by OCRWM adequately describes the basis for withholding the information under Exemption 5. The letter states that the withheld documents were drafts and, therefore, “by their very nature, are pre-decisional” and “part of the deliberative process by which [...] agency action was considered and taken.”²¹ OCRWM need not provide an individualized basis for each of the documents withheld where the same justification applies to each invocation of Exemption 5 in all 79 documents.

Nevertheless, non-deliberative portions of DOE/GC and OCRWM documents must be segregated and released to the Appellant as explained in Section D below.

C. Description of Withheld Material

A document must be described with enough specificity to allow the requester to: (1) ascertain whether the claimed exemptions reasonably apply to the documents and (2) formulate a meaningful appeal.²² Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its authors and recipients. The description need not contain information that would compromise the privileged nature of the document.²³

1. Documents Withheld by DOE/GC

The following four descriptions are representative of the descriptions of the other 17 documents withheld by DOE/GC²⁴:

- 1) Document #5 (Withheld in Entirety): Document entitled “Nevada Rail Project, Caliente Overview, dated November 26, 2003.” Presented to Robert Card, Presented by: Nevada Transportation Project Team, TBD, Las Vegas, Nevada. U.S. Department of Energy, Office of Civilian Radioactive Waste Management. 19 pages.
- 2) Document #4 (Withheld in Entirety): Document entitled “Activities That Could be Accomplished If No Mode/Corridor Decision Made Until 1/05” 1 page.
- 3) Document #11 (Withheld in Part): Undated Memorandum for The Secretary, Through Robert G. Card, Under Secretary, From Margaret Chu, Director, Office of Civilian Radioactive Waste Management and Beverly Cook,

²¹ OCRWM Determination Letter at 2.

²² See *R.E.V. Eng.*, 28 DOE ¶ 80,116 at 80,543 (2000); *Paul W. Fox*, 25 DOE ¶ 80,150 at 80,622 (1995), citing *James L. Schwab*, 22 DOE ¶ 80,164 (1992); *Harold Fine*, 17 DOE ¶ 80,136 at 80,588 (1988); *Arnold & Porter*, 12 DOE at 80,527.

²³ *R.E.V. Eng.*, 28 DOE at 80,543; *Arnold & Porter*, 12 DOE at 80,527.

²⁴ There are two enclosures list from DOE/GC. One includes documents released or withheld in part. The other list contains documents withheld in their entirety.

Assistant Secretary for Environment, Safety and Health. Subject: Selection of a preferred rail corridor to Yucca Mountain. 1 page.

After reviewing all the descriptions in the list, we find that DOE/GC adequately identified the subject matter and, where available, the date, author and recipient of the documents.

2. Documents Withheld by OCRWM

The following documents demonstrate the level of description provided for the vast majority of the 79 withheld documents²⁵:

- 1) Document #9: Undated document entitled "Memorandum for the Secretary," from Margaret Chu and Beverly Cook through Robert G. Card, Subject: ACTION: Approve Mostly Rail as Mode of Transportation and Caliente as Corridor Preference for Transportation of Spent Nuclear Fuel and High-level Radioactive Waste to Yucca Mountain, and Publish these decisions in the *Federal Register*. 4 pages.
- 2) Document #44: Draft letter regarding issuance of the ROD and NOI dated April 1, 2004. 2 pages.

This level of description is adequate. We, however, identify two documents that are not adequately described:

- 1) Document #14: Undated note. 1 page.
- 2) Document #17: Email from Gary Lanthrum to Jay Jones, Nancy Slater Thompson, Robin L. Sweeney, Tom Cotton, and Ted Garrish, dated December 10, 2003. 2 pages.

With respect to these two documents, we shall remand this matter to OCRWM to provide an adequate description of the material withheld. We note that, on the whole, OCRWM provided sufficient descriptions for most of the withheld documents. The remaining 77 withheld documents were sufficiently identified to allow the requester to ascertain the matters withheld and to formulate an appeal. Moreover, the Appellant did in fact raise cogent arguments regarding those 77 documents.

D. Segregability of Non-Exempt Material of DOE and OCRWM Documents

The FOIA requires that "any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt."²⁶

²⁵ OCRWM List, Documents Withheld in their Entirety.

²⁶ 5 U.S.C. § 552(b), *see also Greg Long*, 25 DOE ¶ 80,129 (1995).

In cases where the exempt material is so inextricably intertwined that disclosure of it would reveal “only essentially meaningless words and phrases,” it need not be released.²⁷

In the instant case, DOE/GC withheld seven documents in their entirety and substantial portions of ten other documents, and OCRWM withheld 79 documents in their entirety. On inspection of these documents from each of these offices, we find that there are portions of factual material which could be segregated from the exempt portions of several of these documents. For example, we identify the following DOE/GC documents which appear to contain nonexempt factual information:

- 1) Document #3(A) (Withheld in Entirety): Document entitled “Opening Statement,” March 21, 2001. 7 pages.
- 2) Document #2(A) (Withheld in Part): Undated draft document entitled “Department of Energy Record of Decision on Mode of Transportation and Nevada Rail Corridor for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, with handwritten notations.” 31 pages.

OCRWM also withheld documents containing segregable factual information:

- 1) Document #26 (Withheld in Entirety): “Department of Energy Notice of Preferred Rail Corridor,” dated December 2, 2003. 8 pages.
- 2) Document #19 (Withheld in Entirety): Undated draft letters (6) from Margaret Chu to Governor Kenny Guinn. 1 page each.

The DOE/GC determination letter does not discuss segregability. The OCRWM determination letter states that it applied the “reasonable segregation” standards to the documents, but it determined that “nonexempt factual material is so interspersed with exempt material that segregation would only leave meaningless words and phrases.”²⁸ However, based on our review, sections of DOE/GC and OCRWM documents contain purely factual information that is clearly separate from recommendations, advice, opinions and other information protected by the deliberative process privilege. On remand, DOE/GC and OCRWM should review all the documents which were withheld in part or in their entirety, and either segregate and release all factual information or issue a new determination that justifies any withholding.

IT IS THEREFORE ORDERED THAT:

- (1) The Freedom of Information Act Appeal filed by the State of Nevada on April 6, 2005, OHA Case No. TFA-0098, is hereby granted as set forth in paragraph (2) below and is denied in all other respects.

²⁷ *Neufeld v. IRS*, 646 F.2d 661, 663 (D.C. Cir. 1981).

²⁸ OCRWM Determination Letter at 3.

- (2) This matter is hereby remanded to the Acting Assistant General Counsel for General Law of the Department of Energy and the Office of Civilian Radioactive Waste Management for the issuance of new determinations in accordance with the instructions set forth above.
- (3) This is a final order of the Department of Energy form which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 23, 2005